119 T

IN THE

Supreme Court of the United States

COY PHELPS,

Petitioner,

v.

CAROLYN SABOL, ALBERTO GONZALES AND HARLEY LAPPIN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Coy Phelps 78872-011
Pro Se
FMC-Devens
P.O. Box 879
Ayer, Massachusetts 01432

Dated: February 10, 2009

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

Introductory Comment:

Petitioner alleges issues of national importance because even though citizens of the United States have not committed any crimes, and have not violated any laws, ever since May 10, 1930 the federal government has been incarcerating U.S. citizens in federal prison and have been treating the citizens as sentenced prisoners simply because the federal government has determined the citizens to be politically incorrect or socially undesirable. The incarceration of unconvicted, and unaccused, citizens is in violation of the 1st, 4th, 5th, 6th, 8th, and 14th amendments to the Constitution and in violation of 18 U.S.C. §4001(a) which states that no citizen shall be imprisoned, or detained, in any federal facility unless there is a federal law authorizing such imprisonment or detention and... there is no federal law authorizing unconvicted, and unaccused, citizens to be incarcerated in the Federal Bureau of Prisons system. Neither the courts, nor the U.S. Attorney General, nor the U.S. Attorney, nor the Federal Bureau of Prisons has been able to identify, or point to, any federal law that authorizes the Federal Bureau of Prisons to have custody of unconvicted and unaccused citizens and they have been unable to identify, or point to, a single federal statute that authorizes an unconvicted, and unaccused, citizen to be confined in any federal facility to be treated as a convicted and sentenced prisoner.

The court, and the government, argues that §4001(a) cannot be applied to the petitioner because §4001(a) applies only in wartime and the United States is not engaged in a domestic or foreign war.

The courts, and the government, admit that the petitioner has not committed a crime and has not violated any laws and that the petitioner is neither insane or mentally ill; and they admit that there is no federal law authorizing him to be in custody of the Federal Bureau of Prisons or to be confined in any federal facility, especially a federal prison facility, but the courts will not release the petitioner because it has found that his sincerely held shared Christian beliefs and teachings are politically incorrect and socially distasteful and undesirable.

They admit that there is no other reason for his incarceration but cannot present any supporting legal justification for their decisions that the petitioner can be incarcerated in federal prison.

18 U.S.C. §4042(a) does not allow unconvicted, and unaccused, citizens to be confined in any facility managed, operated, or administered by the Federal Bureau of Prisons. The BOP has authority ONLY over those who are accused of crimes and those convicted of crimes who may lawfully be confined in a penal or correctional institution. The lower courts did not address this issue.

The petitioner cited several U.S. Supreme Court decisions to support his claim of unlawful and unconstitutional imprisonment and detention, but the court held that it is not bound by any Supreme Court decision that was on a case outside of the first circuit courts. The court held that it need only follow Supreme Court decisions made on first circuit cases.

The petitioner asked for an appointment of counsel and showed that he has written over six hundred letters to attorneys, law firms, and legal

organizations in attempts to find counsel to represent him and no attorney would accept the case because there was not enough money in it for them. The court denied all motions for appointment of counsel.

Petitioner claims that all the BOP employees have acted in clear absence of all lawful jurisdiction and authority in that the BOP has never had lawful custody of him in almost 25 years of incarceration.

The court held that the issue is barred by res judicata because the issue could have been presented previously. The petitioner argued that he did present the issue but no court ever addressed the lawfulness of a BOP facility. The petitioner claims that his unlawful incarceration creates an undue and unreasonable atypical and significant hardship and res judicata cannot ever trump a miscarriage of justice.

The petitioner asks for money damages for his 25 years of wrongful and unreasonable incarceration and prolonged detention. The court held that the petitioner should not ask for money damages no matter how wrong the employees of the government have acted.

QUESTION 1

Whether 18 U.S.C. §4001(a) applies to all citizens in times of peace and in times of war.

QUESTION 2

Whether 18 U.S.C. §4042(a) authorizes the Federal Bureau of Prisons to have custody of unconvicted and unaccused citizens.

QUESTION 3

Whether the Federal Bureau of Prison has ever had lawful custody of unconvicted and unaccused citizens.

QUESTION 4

Whether the first circuit is bound by decision of the U.S. Supreme Court cases that originated outside the first circuit courts.

QUESTION 5.

Whether res judicata trumps a miscarriage of justice.

QUESTION 6

Whether there is any federal statute that authorizes the Federal Bureau of Prisons to have lawful custody of unconvicted and unaccused citizens.

QUESTION 7

Whether the employees of the Bureau of Prisons have acted in clear absence of all lawful jurisdiction and authority.

QUESTION 8

Whether the petitioner has a right to ask for money damages.

QUESTION 9

Whether counsel should have been appointed to represent the petitioner.

CORPORATE STATEMENT

There are no corporate statements to make.

PARTIES

All parties to this action are named in the caption.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

Constitutional Provisions, Codes and Rules:

United States Constitution

United States Code

OPINIONS BELOW

The opinions of the United States Court of Appeals for the First Circuit.

JURISDICTION

The United States Court of Appeals for the First Circuit decided this case on 11/13/2008.

No petition for a rehearing was filed.

This court has jurisdiction under 28 U.S.C. §1254(1) and 28 U.S.C. §2101.

The First Circuit U.S. Court of Appeals had jurisdiction under 28 U.S.C. §1291.

The U.S. District Court had jurisdiction under 28 U.S.C. §1331, 28 U.S.C. §1343; 5 U.S.C. §701-706; 28 U.S.C. §1332; 28 U.S.C. §§2201-2202; 42 U.S.C. §1988; 42 U.S.C. §2000bb-2; 42 U.S.C. §2000dd; 42 U.S.C. §2000aa; 28 U.S.C. §1356; and Rule 65 of the Federal Rules of Civil Procedures and 28 U.S.C. §2284(b)(3).

The U.S. District Court also had jurisdiction under Bivens v. Six Unnamed Agents Of The Federal Bureau Of Narcotics, 403 U.S. 388, 29 L.Ed.2d 619, 91 S.Ct. 1999 (1971).

The petitioner also invoked jurisdiction under twenty-two other U.S. Supreme Court decisions.*

---

* Leedom v. Kyne, 358 U.S. 184 (1958); S.E.C. v. Sloan, 436 U.S. 103 (1978); Reno v Koray, 515 U.S. 50 (1995); Califano

The petitioner invoked jurisdiction under the first, fourth, fifth, sixth, eighth, ninth, and fourteenth amendments to the U.S. Constitution (with the eighth and fourteenth amendments made applicable, through the fifth amendments.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The respondents acted without discretionary authority, and not in the scope of their employment, by conspiring to cause the petitioner (Phelps) to suffer wrongful incarceration, unlawful and prolonged detention, false imprisonment and confinement, unreasonable seizure, restriction, and restraint, unauthorized restraint, and unconstitutional confinement in various federal penal and correctional institutions under inhumane conditions of confinement for over twenty years knowing that Phelps did not commit a crime, nor violate any laws, and that the employees of the Federal Bureau of Prisons acted in clear absence of all lawful jurisdiction and authority, and that their

---

v. Saunders, 430 U.S. 99 (1977); Carlson v. Green, 446 U.S. 14 (1980); Gwaltney v. Chesapeake Bay Foundation, 484 U.S. 49 (1987); Trop v. Dulles, 366 U.S. 86 (1958); Bush v. Lucas, 462 U.S. 367 (1983); Estelle v. Gamble, 429 U.S. 97 (1976); Farmer v. Brennan, 511 U.S. 825 (1994); Wolff v. McDonnell, 418 U.S. 539 (1974); Public Citizen v. U.S. Dept. of Justice, 491 U.S. 440 (1989); Murray v. Carrier, 477 U.S. 478 (1906), American Trucking Ass'ns v. Frisco Transportation Co., 358 U.S. 133 (1958); US v. Stanley, 433 U.S. 169 (1937); Davis v. Passman, 442 U.S. 228 (1979); DeShaney v. Winnebago, 489 U.S. 189 (1989); Plante v. Scott, 453 U.S. 1101 (1983); Illinois v. City of Milwaukee, 406 U.S. 91 (1982); Jones v. U.S., 463 U.S. 354 (1983); Youngberg v. Romeo, 457 U.S. 307 (1982); Foucha v. Louisiana, 504 U.S. 71 (1992).

acts, actions, inactions, and omissions were in violation of the constitutional, statutory, and civil rights of Phelps and violated clearly established Supreme Court holdings as well as the first, fourth, fifth, sixth, eighth, ninth, and fourteenth amendments to the U.S. Constitution, 18 U.S.C. §4001(a), 18 U.S.C. §4042(a), 18 U.S.C. §4243, 18 U.S.C. §4247(i), 42 U.S.C. §1985, 42 U.S.C. §1986, 42 U.S.C. §2000aa, 42 U.S.C. §2000bb-1, 42 U.S.C. §2000dd. (Full text of statutes are at pp. 3-12.)

The respondents violated the decision of the U.S. Supreme Court as stated in:

U.S. v. Classic, 313 U.S. 299 (1941); Trop v. Dulles, 356 U.S. 86 (1958); Robinson v. California, 370 U.S. 660 (1962); Humphrey v. Cady, 405 U.S. 504 (1972); McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972); O'Connor v. Donaldson, 422 U.S. 563 (1975); Parnham v. JR, 442 U.S. 504 (1979); Howe v. Smith, 452 U.S. 473 (1981); Pennhurst v. Halderman, 451 U.S. 1 (1981); Mills v. Rogers, 457 U.S. 291 (1982); Youngberg v. Romeo, 457 US 307 (1982); Jones v. U.S., 463 U.S. 354 (1983); Deshaney v. Winnebago, 489 U.S. 189 (1989); Medina v. California, 505 U.S. 437 (1992); Foucha v. Louisiana, 504 U.S. 71 (1992); Heller v. Doe, 509 U.S. 312 (1993). (Cases are cited and explained in the argument section of this petition.)

Amendment I

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV

Unreasonable searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment VIII

Bail—Punishment.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

Rights retained by people.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment XIV

Section. 1 [Citizens of the United States.]

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 USCS §4001

§4001. Limitation on detention; control of prisons

(a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.

(b)(i) The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended and the applicable regulations.

§4042. Duties of Bureau of Prisons

(a) In general. The Bureau of Prisons, under the direction of the Attorney General, shall— (1) have charge of the management and regulation of all Federal penal and correctional institutions;

(2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;

(3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States;

18 USCS §4243

§4243. Hospitalization of a person found not guilty only by reason of insanity

(a) Determination of present mental condition of acquitted person. If a person is found not guilty only by reason of insanity at the time of the offense charged, he shall be committed to a suitable facility until such time as he is eligible for release pursuant to subsection (e).

. . . . . .

(e) Determination and disposition. If, after the hearing, the court fails to find by the standard specified in subsection (d) of this section that the person's release would not create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility until—

(1) such a State will assume such responsibility; or

(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment, would not create

a substantial risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

18 USCS §4247

§4247. General provisions for chapter

(a) Definitions. As used in this chapter [18 USCS §§4241 et seq.]—

(1) "rehabilitation program" includes—

(A) basic educational training that will assist the individual in understanding the society to which he will return and that will assist him in understanding the magnitude of his offense and its impact on society;

(B) vocational training that will assist the individual in contributing to, and in participating in, the society to which he will return;

(C) drug, alcohol, and sex offender treatment programs, and other treatment programs that will assist the individual in overcoming a psychological or physical dependence or any condition that makes the individual dangerous to others; and

(D) organized physical sports and recreation programs;

(2) "suitable facility" means a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant;

(i) Authority and responsibility of the Attorney General. The Attorney General—

(A) may contract with a State, a political subdivision, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody pursuant to this chapter [18 USCS §§4241 et seq.];

(B) may apply for the civil commitment, pursuant to State law, of a person committed to his custody pursuant to section 4243, 4246, or 4248 [18 USCS §4243, 4246, or 4248];

(C) shall, before placing a person in a facility pursuant to the provisions of section 4241, 4243, 4244, 4245, 4246, or 4248 [18 USCS §§4241, 4243, 4244, 4245, 4246, or 4248], consider the suitability of the facility's rehabilitation programs in meeting the needs of the person; and

(D) shall consult with the Secretary of the Department of Health and Human Services in the general implementation of the provisions of this chapter [18 USCS §§4241 et seq.] and in the establishment of standards for facilities used in the implementation of this chapter [18 USCS §§4241 et seq.].

42 USCS §1985

. . . . .

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of

equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. (R. S. §1980.)

42 USCS §1986

§1986. Action for neglect to prevent conspiracy
Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section [42 USCS §1985], are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable

diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action, and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued. (R. S. §1981.)

42 USCS §2000bb-1

§2000bb-1. Free exercise of religion protected

(a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief. A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or

defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.
(Nov. 16, 1993, P. L. 103-141, § 3, 107 Stat. 1488.)

§2000dd-0. Additional prohibition on cruel, inhuman, or degrading treatment or punishment.
(1) In general. No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.
(2) Cruel, inhuman, or degrading treatment or punishment defined. In this subsection, the term "cruel, inhuman, or degrading treatment or punishment" means cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.
(3) Compliance. The President shall take action to ensure compliance with this subsection, including through the establishment of administrative rules and procedures.
(Oct. 17, 2006, P. L. 109-366, § 6(c), 120 Stat. 2635.)

STATEMENT OF THE CASE

This case is a question of law and requires statutory analysis under the strict scrutiny standard.

There are no federal laws that allow, or authorizes, the petitioner (Phelps) to be confined in any federal facility, especially a federal prison facility.

The government, and the courts, have admitted that Phelps did not commit any crimes and did not violate any laws, yet, will not release him solely because of his sincerely held shared religious beliefs, political beliefs, and philosophical ideologies.

Phelps has never been convicted of any felonious crimes but has suffered incarceration in the Federal Bureau of Prisons system since 1983 and has been treated as if he had been found guilty of crimes and sentenced to a term of imprisonment.

Since his incarceration in the Federal Bureau of Prisons system, Phelps has been treated the same as, and worse than, convicted and sentenced prisoners which are classified as high security and maximum security dangerous prisoners.

The Federal Bureau of Prisons, and the government, admit that the court order committing Phelps to the custody of the Federal Bureau of Prisons is a nullity, and unlawful, and that the court exceeded its authority in issuing the order but will not release Phelps solely because of his politically incorrect sincerely held shared religious beliefs, political views, and philosophical ideologies.

STATEMENT OF THE FACTS

1. Phelps was arrested in 1983 and charged with several crimes of bombings.

2. Phelps claimed that he was innocent and claimed that he was being framed into prison in an international conspiracy. The attorney for Phelps believed Phelps was insane, and therefore, entered a plea of not guilty by reason of insanity.

3. A jury found Phelps to be not guilty by reason of insanity and did not believe his claim of an international conspiracy.

4. 18 U.S.C. §4243(b) requires a civil hearing, separate from the criminal trial, with a civil docket number to separate the civil matter from the criminal matter. There was no civil hearing.

5. 18 U.S.C. §4243 requires three certificates before Phelps can be confined in any facility: (1) a Certificate of mental disease or defect, (2) a Certificate of severity, and (3) a Certificate of State's refusal to accept responsibility. There are no such certificates in the record.

6. 18 U.S.C. §4243(e) designates the U.S. Attorney General as the one solely responsible to provide hospitalization, care, treatment, and services to Phelps.

7. The Attorney General may delegate his authority to other federal agencies under 28 U.S.C. §510, but only to those agencies, and officers, authorized (by federal statute to administer the federal mental health laws. Neither the Federal

Bureau of Prisons, or its employees, are authorized (by statute) to administer the federal mental health laws.

8. Under 18 U.S.C. §4243(e) the court can commit Phelps ONLY to the custody of the U.S. Attorney General, not to the custody of the Federal Bureau of Prisons. The court committed Phelps to the custody of the Federal Bureau of Prisons as a convicted prisoner is committed under 18 U.S.C. §3621.

9. 18 U.S.C. §4243(e) gives the Attorney General three options. The Attorney General may (1) release the acquittee unconditionally to the community, or (2) release the acquittee to an appropriate State official to supervise the acquittee in the community, or (3) hospitalize the acquittee in a facility as determined by the provisions of 18 U.S.C. §4247(i). The Attorney General did not exercise any of the options, but rather, incarcerated Phelps in federal prison as a convicted and sentenced prisoner.

10. 18 U.S.C. §4247(i) gives the Attorney General ONLY four options if he chooses to hospitalize an acquittee: (1) Petition a State court for a State civil commitment into a State mental hospital pursuant to State laws, or (2) enter into a private contract with a State (or political sub-division), or (3) enter into a private contract with a locality, or (4) enter into a private contract with a private agency to provide hospitalization, care, treatment, and services to Phelps. The Attorney General did not exercise any of these options, but rather, incarcerated Phelps in federal prison to be

treated the same as, and worse than, convicted and sentenced prisoners.

11. 18 U.S.C. §4243(a) requires Phelps to have committed a crime before the terms of the statute can be applied to him.

12. In 1993, the government discovered uncontested evidence that not only did Phelps NOT commit the crimes for which he was charged, but that the claims of Phelps being framed into prison in an international conspiracy was, indeed, true. Still, the government, and the court, refused to release Phelps solely because of his politically incorrect sincerely held shared religious beliefs, political views, and philosophical ideologies.

13. 18 U.S.C. §4247(i) requires a facility to be approved, and certified, by the Secretary of the Department of Health and Human Services (DHHS) before Phelps can be confined in that facility. The Secretary has NEVER approved, or certified, a Federal Bureau of Prison facility.

14. 18 U.S.C. §4247(i) requires the Secretary of the DHHS to implement the provisions of the federal mental health laws, not the Federal Bureau of Prisons. The Attorney General is requiring the Federal Bureau of Prisons to administer the federal mental health laws when the Federal Bureau of Prisons has no statutory authority to administer the mental health laws.

15. 18 U.S.C. §4042(a) gives the Federal Bureau of Prisons jurisdiction and authority ONLY over penal and correctional institutions (Not hospitals) and ONLY over those accused of crimes

and those convicted of crimes (not civil commitments.) There are no federal laws authorizing the Federal Bureau of Prisons to have custody of Phelps. Under 18 U.S.C. §4243(e) Phelps is required to be hospitalized.

16. 18 U.S.C. §4001(a) states that no citizen shall be imprisoned, or detained, in any federal facility unless there is a federal law authorizing such imprisonment or detention. There are no such federal laws authorizing Phelps to be incarcerated, imprisoned, detained, or confined in any federal facility.

17. 18 U.S.C. §4243(e) requires the Attorney General to continue to make ALL reasonable efforts to CAUSE the State to assume responsibility of Phelps. In 2008, the social worker of the prison (the final delegated authority of the Attorney General) made an affidavit to the court stating that she has NEVER made any effort to cause the State to assume responsibility and has NEVER made any attempt to effect the release of Phelps.

18. Senate Report 225, 98th Congress, 2nd Session 250 makes it clear that the intent of Congress is for the State to assume custody of federal civil commitments because the federal government does not have a civil hospital in which to hospitalize civil commitments as the federal laws require.

19. 28 C.F.R. §503.1 states that all the facilities under the authority of the Federal Bureau of Prisons are penal and correctional institutions.

20. Under 18 U.S.C. §3621 only convicted and sentenced "prisoners" (not civil commitments) may be sent to the Federal Bureau of Prisons system.

21. The U.S. Supreme Court, and several Circuit courts, have held that the phrase "mental disease or defect" applies only to "insanity" and not to mental illness; And Phelps was committed because of "insanity" but is being kept in incarceration because of his politically incorrect sincerely held shared religious beliefs, political views, and philosophical ideologies after testimony in court established that Phelps had never been insane nor mentally ill.

22. The standards of the psychiatric and psychological profession are established in the Diagnostics and Statistical Manual of Mental Disorders, Text Revised, 4th Edition (DSM-TR-IV) and all psychiatrists and psychologists are bound by those standards. In the "Cautionary Statement" of the DSM-TR-IV, and in the definition of "Mental Disorder," the DSM-TR-IV states that neither religious beliefs, criminal acts, or cultural values can be used to make a diagnosis and to do so is to exercise unprofessional judgment.

23. There are no Code of Federal Regulation nor any Bureau of Prisons Policy Statements (rules) pertaining to the care and treatment of federal civil commitments; because there are no federal statutes authorizing the Federal Bureau of Prisons to have custody of federal civil commitments;

Because the Federal Bureau of Prisons has never had lawful custody of Phelps, the employees of

the Federal Bureau of Prisons have always acted in clear absence of all lawful jurisdiction and authority;

Because Phelps is unconvicted, and unaccused, and because of his status as a federal civil commitment, incarceration in a federal prison is inhumane; And because of his civil commitments status, the employees of the Federal Bureau of Prisons have treated him worse than convicted and sentenced prisoners under a sentence of punishment.

REASONS FOR GRANTING THE PETITION

FALSE IMPRISONMENT: WRONGFUL INCARCERATION: UNREASONABLE DETENTION:

18 U.S.C. §4001(a):

18 U.S.C. §4001(a) states that no citizen shall be imprisoned, or detained, in any federal facility unless there is a federal law authorizing such imprisonment or detention.

Phelps alleges that there are no federal laws that authorize him to be incarcerated in any federal facility, especially a federal prison facility. Neither the government, or the courts, have identified, or pointed to, such a law.

The government argued that §4001(a) cannot apply to Phelps because §4001(a) can only be applied in times of war and the United States is not in an official war declared by Congress. The District Court agreed and the First Circuit affirmed.

The government cited Hamdi v. Rumsfeld, 542 U.S. 507, 15 L.Ed.2d 578, 124 S.Ct. 2633 (2004) as its authority. However, the Supreme Court did not address the applicability of §4001(a) in Hamdi because it found there was a federal law that authorized the incarceration and detention of Hamdi. But in the Phelps case, there is no federal law. The Supreme Court decided the case of Howe v. Smith, 452 U.S. 473, 69 L.Ed.2d 171, 101 S.Ct. 2468 (1981) in times of peace and held that a state prisoner could not be transferred to a federal prison unless there was a federal law authorizing it. But, as in the Hamdi case, there was a federal law. But is in the case of Phelps, there is no federal law authorizing him to be incarcerated in any federal prison facility.

Phelps claims that his incarceration, and imprisonment, in a federal prison violated his rights under the fourth, fifth, and eighth amendments as well as violating 18 U.S.C. §4301(a), 18 U.S.C. §4042(a), 18 U.S.C. §4243(e), and 18 U.S.C. §4247(i).

18 U.S.C. §4042(a):

18 U.S.C. §4042(a) states that the Federal Bureau of Prisons has jurisdiction and authority ONLY over penal and correctional institutions (not hospitals) and ONLY over those accused of crimes and those convicted of crimes (not civil commitments.)

Phelps is a federal civil commitment who is required to be committed to the custody of the U.S. Attorney General under 18 U.S.C. §4243(e). §4243(e) in turn, requires the Attorney General to "hospitalize" Phelps if Phelps needed hospitalization.

The federal government does not have a civil hospital (U.S. v. Beidler, 417 F. Supp. 608 (W.D. Mo. 1976) so the Attorney General decided that federal prison was just as good as a hospital and, thusly, incarcerated Phelps in federal prison to be treated the same as, and worse than, convicted and sentenced prisoners.

Phelps argues that such incarceration is cruel and unusual punishment in violation of the eighth amendment and 42 U.S.C. §2000dd which prohibits cruel and unusual punishments, inhumane conditions of confinement, and torture.

The government argued that since the Attorney General had only a limited selection of prisons, then the Federal Medical Centers under the authority of the Federal Bureau of Prisons were suitable facilities for care and treatment.

The government argued that a prison is suitable under 18 U.S.C. §4247(a) for the care and treatment of mentally ill convicted and sentenced prisoners, thusly, a federal prison is, *ipso facto*, suitable for the care and treatment of civil commitments. The District Court agreed and the First Circuit affirmed.

In Williams v. Richardson, 481 F.2d 358 (8th Cir. 1978) the court said "we have continuously held that the Federal Medical Centers under the authority of the Federal Bureau of Prisons, are penal institutions and those confined therein suffer incarceration not hospitalization."

18 U.S.C. §4243(e) requires the Attorney General to "hospitalize" Phelps if Phelps is in need of hospitalization. In U.S. v. Sherman, 722 F.Supp. 504 (N.D. Ill. 1989), the court held that §4243(e) requires hospitalization but §4243 does not instruct the Attorney General just how to accomplish the hospitalization. The court found that to answer that question, we must look at 18 U.S.C. §4247(i).

18 U.S.C. §4247(i):

18 U.S.C. §4247(i) gives the Attorney General only four options and the Attorney General did not exercise any of the four options. Instead, the Attorney General incarcerated Phelps in federal prison to be treated the same as, and worse than, convicted and sentenced prisoners.

In Heller v. Doe, 504 U.S. 312, 325 (1993) the Supreme Court held that prisons are more onerous than mental hospitals; and in Jones v. U.S., 463 U.S. 354, 369 (1983) the Supreme Court held that insanity acquittees could not be treated as convicted prisoners; and in Youngberg v. Romeo, 457 U.S. 307, 321-322 (1982) the court held that civil commitments must be given more considerate treatment than convicted prisoners. However, Phelps is being treated worse than convicted prisoners under inhumane conditions.

In Humphrey v. Cady, 405 U.S. 504 (1972) and in McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972) the court held that a separate wing, or building, or housing unit inside a prison is not suitable for the confinement of civil commitments. In Jones v. Blanas, 393 F.3d 918 (9th Cir. 2004), the Ninth Circuit held that civil commitments could not

be confined in any county jail or prison facility in that they had not been convicted (citing Jones v. U.S.).

Phelps is incarcerated in federal prison because of his civil commitment status. In Robinson v. California, 370 U.S. 660 (1962) the Supreme Court held that one could not be incarcerated in a prison facility because of his medical status. (Robinson was a narcotic addict who was incarcerated in prison without having committed a crime. He was just an addict.) Phelps did not commit a crime and is incarcerated solely because of his religious beliefs which the government finds politically incorrect.

In Foucha v. Louisiana, 504 U.S. 71 (1992) the Supreme Court held that insanity acquittees cannot be confined in any prison facility and that an insanity acquittee must be released when he is no longer insane, regardless if the acquittee has a mental illness or not (Personality disorder.) The First Circuit held in Buzynski v. Oliver, 538 F.2d 6 (1st Cir. 1976) that it was unconstitutional to confine a civil commitment in a prison facility.

The government, argues that because a Bureau Of Prison facility is suitable to provide mental health care and treatment for convicted and sentenced prisoners, then it is, *ipso facto*, suitable to provide care and treatment to civil commitments under 18 U.S.C. §4247(a) (which discusses rehabilitation programs.)

Phelps argues that before a facility can be suitable under 18 U.S.C. §4247(a) it must first be lawful under 18 U.S.C. §4247(i) and no Federal Bureau of Prisons facility has ever been lawful under

§4247(i). Additionally, the BOP cannot equate the care and treatment of convicted prisoners with the care and treatment of civil commitments. Moreover, the BOP cannot equate insanity with mental illness.

The BOP holds that there is no difference between mental illness and insanity and the treatments for one is the treatment for the other.

In Ecker v. U.S., 489 F.Supp.2d 130 (D. Mass. 2007) (The only court to address the issue of the lawfulness of a BOP facility under 18 U.S.C. §4247(i)) the court held that the BOP custodian of civil commitments were troublesome from both a statutory and constitutional perspective, especially, confinement in a federal prison facility. The court recognized that it was the intent of Congress to have the State to assume custody of federal civil commitments and ordered the Attorney General to transfer custody to the State or the court would release the committee itself. The Attorney General took no action, so the court ordered the release. A federal civil commitment cannot be held in federal custody, and when the State will not accept responsibility, then the acquittee must be released either unconditionally or conditionally under 18 U.S.C. §4243(f) or be transferred to a facility under the terms of 18 U.S.C. §4247(i). The acquittee cannot be held in any federal facility. The law simply does not allow for such imprisonment or detention.

Since May 10, 1930, the federal government has incarcerated citizens in federal prison under civil laws what it could not do under criminal laws simply because the government has determined that certain citizens are "undesirable." It does not matter to the

government that these citizens have not committed any crimes nor have they violated any laws.

18 U.S.C. §4247(i) gives the Attorney General ONLY four options in the hospitalization of Phelps: (1) Petition a State court for a State civil commitment into a State mental hospital pursuant to State laws, and if that fails, (2) enter into a private contract with the State (or political subdivision), or (3) enter into a private contract with a locality, or (4) enter into a private contract with a private agency to provide hospitalization, care, treatment, and services to Phelps. The Attorney General did not exercise any of his options. Instead, the Attorney General deliberately misapplied the laws to cause Phelps to suffer incarceration in federal prison to be treated the same as, and worse than, convicted and sentenced prisoners. THERE ARE NO FEDERAL LAWS THAT AUTHORIZE PHELPS TO BE CONFINED IN ANY FEDERAL FACILITY, ESPECIALLY A FEDERAL PRISON FACILITY.

18 U.S.C. §4247(i) has no provision for federal confinement, especially confinement in a federal prison facility.

Under 18 U.S.C. §4042(a) the Federal Bureau of Prisons does not have lawful custody of Phelps and the employees of the Federal Bureau of Prisons act in clear absence of all lawful authority in the care and treatment of Phelps.

Phelps is being wrongfully, and unreasonably, incarcerated in a federal prison facility not only in violation of the constitution and federal laws, but

also by the deliberate misapplication of the federal mental health laws.

Under 18 U.S.C. §4243 a person cannot be hospitalized, or confined, unless he suffers from a "mental disease or defect." Phelps alleged that the phrase "mental disease or defect" applies ONLY to insanity and not to a mental illness or mental disorder.

Neither the government, or the court, opposed this argument.

Phelps alleged that he was committed to the custody of the Attorney General because of "insanity" but is being kept in confinement because the doctors say that he has a mental illness, but is not insane.

Phelps cited thirty court decisions holding that a mental disorder or a mental illness is not a "mental disease or defect" including two Supreme Court cases of Foucha v. Louisiana, 504 U.S. 71, 118 L.Ed.2d 437, 112 S.Ct. 1780 (1992) (mental illness, personality disorder) Clark v. Arizona, 548 U.S. 735, 165 L.Ed.2d 842, 126 S.Ct. 2709 (2006) (Delusions, Paranoid Schizophrenia, Anti Social Personality Disorder.)

The published cases stated that the following is not a mental disease or defect: Paranoid Delusions; Schizo-affective Disorder, Paranoid Schizophrenia, Anti-Social Personality Disorder, Diminished Capacity, Incompetence, Obsessive Compulsive Disorder, Substance Abuse, Memory Loss, Black-outs, Major Depressive Disorder, Schizophrenia, Schizoid Personality Disorder,

Delusional Disorder, Paranoid Personality Disorder, Fixations, Compulsions, Litiguiousness, Criminal Acts, Narcissistic Personality Disorder, Manipulation disorder, Multiple Personality Disorder, Conspiracy Delusions, Psychotic Delusional Beliefs, Pedophilia, Conflicts with Society, Post-Traumatic Stress Disorder, Diety Disorder, Mental Retardation, Mixed Personality Disorder, Passive Aggressive Disorder, Several Personality Disorder, False Beliefs, Bi-Polar Disorder Schizotypal Personality Disorder, Latent Atypical Psychosis, Nazi Beliefs, Battered Woman's Syndrome, and Impaired Mental Condition. The courts have agreed that a mental illness or a mental disorder does not qualify as a "mental disease or defect" under the federal mental health laws.

Even after admitting that Phelps is not "insane" (as defined by law) the government argues that his sincerely held shared religious beliefs are politically incorrect for today's times and as such, is a mental illness which keeps him confined in a federal prison facility even though he did not commit a crime.

For over seventy years the federal government, and the Federal Bureau of Prisons, have incarcerated civil commitments without any statutory authority merely because their beliefs are politically incorrect. The issue is of national importance.

In Foucha the Supreme Court held that a person could be confined only as long as he is insane, but no longer. The government, and the courts, admit that Phelps is not insane, but, that he has a mental illness. However, at a court hearing, the

government psychiatrist stated in open court that Phelps was not mentally ill or insane. The government attempted to impeach his own witness by alleging that Phelps was mentally ill. The psychiatrist stated "Well ... you say he is mentally ill. I have been practicing psychiatry for over forty years, and if he is mentally ill, I don't know what it is."

The standards of the psychiatric profession is stated in the Diagnostic And Statistical Manual on Mental Disorder (DSM-IV)) Fourth Edition. The DSM-IV states clearly, in the Cautionary Statement and also in the definition of mental disorder that religious beliefs, political behavior, criminal acts, (such as pedophilia) cannot be used to make a diagnosis of a mental illness (page xxxi). Moreover, the DSM-IV instructs clinicians not to diagnose institutionalized inmates as anti-social personality disorder because being anti-social in an institution setting is normal as a mean of survival.

The doctors at the prison say that Phelps has an anti-social personality disorder and is delusional because of his religion. Such a diagnosis is contrary to the standards of the psychiatric profession and is not exercising professional judgment as required by the Supreme Court in Youngberg v. Romeo, 457 U.S. 307, 73 L.Ed.2d 28, 102 S.Ct. 2452 (1982).

No one has ever reached a diagnosis that qualifies as a "mental disease or defect" under the terms of the law.

Phelps can be confined ONLY as long as he suffers from a mental disease or defect (which is insanity--- not a mental illness) but no longer.

LEGAL INSUFFICIENCY-PROCEDURAL DEFAULT:

Phelps alleged that he is falsely imprisoned because of a procedural error in the proceedings that constitute structural errors.

After a jury has found a person not guilty by reason of insanity, the acquitted person must have a civil hearing, separate from the criminal proceeding to distinguish it from the criminal proceeding. THERE WAS NO CIVIL HEARING. Phelps had a hearing subsequent to the trial as a convicted defendant has a sentencing hearing.

JONES v. U.S. VIOLATION:

The Supreme Court in Jones v. U.S., 463 U.S. 354, 369, 77 L.Ed.2d 694, 103 S.Ct. 3043 (1983) held that "insanity acquittees cannot be treated as convicted prisoners" and in Youngberg, 457 U.S. at 321-322 the court held that civil commitments must be given more considerate treatment than convicted prisoners.

The government argued that Jones did not apply because the case originated out of the District of Columbia Circuit and not the First Circuit and that neither the government, or the courts, are bound by Supreme Court decisions that do not originate in their own circuits. Phelps argued that such was a violation of Hutto v. Davis, 456 U.S. 370, 70 L.Ed.2d 556, 102 S.Ct. 703 (1982) ("All lower courts are bound by the decisions of the Supreme Court.") The court rejected his argument.

Phelps alleged that the Federal Bureau of Prisons has never had lawful custody of him (or any other civil commitment) and, consequently, no employee of the Federal Bureau of Prisons has ever had lawful jurisdiction or authority over Phelps (or any other federal civil commitment ... not since 1930.)

Yet, employees of the Federal Bureau of Prisons, knowing that Phelps is a civil commitment, treated him worse than convicted prisoners are treated. The employees inflicted abuse, mistreatment, and torture with a total disregard to the rights of Phelps and to his well being.

The Federal Bureau of Prisons argues that Phelps was committed to the custody of the Federal Bureau of Prisons by a court order. Phelps argues that, under 18 U.S.C. §4243(e) he cannot be committed to the custody of the BOP and can only be committed to the custody of the U.S. Attorney General who, then, must place Phelps in a suitable facility according to the terms of 18 U.S.C. §4247(i). Phelps alleges that no BOP facility is lawful under 18 U.S.C. §4247(i) and that the court order is a nullity as being without statutory authorization. Any prison official who obeys a court order that is a nullity is guilty of false imprisonment (In Re Watkins, 7 L.Ed. 650, 3 Pet. 193, 28 U.S. 193 (1830) (If the judgment under which the person is imprisoned is a nullity, the officer who obeys the judgment is guilty of false imprisonment.) The Bureau of Prisons know that it does not have lawful custody of civil commitments for 18 U.S.C. §4042 does not grant such authority, therefore, the employees of the BOP knew that such a court order was unlawful and a nullity.

Committing Phelps to the custody of the Federal Bureau of Prisons solely to cause him to be incarcerated because of his status of being a civil commitment violates Robinson v. California, 370 U.S. 660, 8 L.Ed.2d 758, 82 S.Ct. 1417 (1962) (Citizens cannot be imprisoned because of their status of having an illness.)

OBSTRUCTION OF JUSTICE:

18 U.S.C. §4243(f) requires the Director of the facility to notify the court IMMEDIATELY when the acquittee has recovered his sanity. BOP employees do not. They wait until the annual report is due and then notify the court ... if at all. When the BOP determines that the inmate is socially undesirable, or politically incorrect, it will not recommend the release of the inmate even though the inmate is not insane or mentally ill.

Each time a psychiatrist has determined that Phelps is not mentally ill or insane and has notified the prison administration that Phelps should be released, the administration immediately transfers Phelps to another prison. The rule of the BOP is that an inmate must serve at least three years at a facility before he is eligible for release ... regardless of his true condition or status. Phelps is transferred about every two and one-half years.

At the last facility in which Phelps was incarcerated, Dr. Adam Wooten notified the administration that Phelps had never been mentally ill and should be released. The administration told Dr. Wooten that they had orders from "Washington" to keep Phelps in prison regardless of his condition. Dr. Wooten resigned because the administration

would not allow him to exercise his own professional judgments according to the standards of the psychiatric profession and Phelps was immediately transferred to his current federal prison. In the one and one-half hours it took to fly from North Carolina to Massachusetts, Phelps evidently developed a major psychosis because when he arrived, the evaluating psychiatrist diagnosed Phelps as "paranoid schizophrenic" (not insane) without even interviewing Phelps. When Phelps confronted the doctor, the doctor said "I do what I'm told to do."

RES JUDICATA:

The First Circuit has accepted the RESTATEMENT (SECOND) OF JUDGMENT § 23 (1982) (Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26, 30 (1st Cir. 1994)) and the RESTATEMENT holds that res judicata cannot be applied to an aggrieved party when such application would be unfair (Parklane Hosiery, 439 U.S. at 330-331) or which the aggrieved party would suffer an "unusual hardship" (Rose v. Town of Harwich, 778 F.2d 77, 82 (1st Cir. 1985); Kale v. Combined Ins. Co. of America, 924 F.2d 1161, 1168 (1st Cir. 1991.) This "unusual hardship" is the equivalent of the "unfairness" in Parklane and the "atypical and significant hardship" expressed by the Supreme Court in Sandin v. Conner, 515 U.S. 472 (1995) in which the court held that when conditions of confinement are not what is normally expected, then those conditions are unconstitutional.

When one is convicted, one can expect to go to prison, but when one is not convicted, nor even accused of a crime, one can expect to be free of incarceration.

Phelps is not accused nor convicted yet he has suffered incarceration in Federal Prison for almost 25 years, solely because the courts and the government has found his religious teachings to be politically incorrect and socially undesirable. That is an "unusual hardship" that prohibits the application of res judicata.

SUMMARY AND CONCLUSION

Phelps is being incarcerated in federal prison without having committed a crime and without being insane or mentally ill. He is imprisoned solely because of his sincerely held shared Christian religious beliefs, political views, and philosophical ideologies.

There are no statutes authorizing Phelps to be confined in any federal facility, especially a federal prison facility, yet, the federal government has kept him incarcerated for over twenty years.

18 U.S.C. §4042 does not provide for the incarceration of civil commitments therefore the Federal Bureau of Prison has never had lawful custody of Phelps and the BOP employees have never had lawful authority over Phelps. 18 U.S.C. §4247(i) does not authorize confinement in any federal facility and the Attorney General cannot delegate his authority to an agency not authorized to administer the federal mental health laws and an agency cannot confer power upon itself. (Gorbach v. Reno, 219 F.3d 1087 (8th Cir. 2000).

Since 1930, the Federal Bureau of Prisons have incarcerated citizens at the request of the

courts and the government simply because the citizen was found to be politically incorrect or socially undesirable. This petition should be granted.

Respectfully submitted,

In Pro Se
COY PHELPS 78872-011
FMC-DEVENS
P.O. BOX 879
AYER, MASSACHUSETTS 01432

Dated: February 10, 2009

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 08-1474

COY PHELPS
Plaintiff - Appellant

v.

CAROLYN SABOL, WARDEN OF FMC DEVENS, ET AL.
Defendants - Appellees

Before
Lipez, Selya and Howard,
Circuit Judges.

JUDGMENT

Entered: November 13, 2008

Plaintiff Coy Phelps appeals from the dismissal of his complaint and from the denial of various motions. We affirm, essentially for the reasons stated in the district court's March 27, 2008 order. We add only the following comments. We have already rejected plaintiff's claim that the Federal Bureau of Prisons (BOP) does not have lawful custody of him because he is a civilly committed person rather than a prisoner. See Phelps v. Sabol, Appeal Nos. 07-2609 through 07-2612 (6/25/08

Judgment). Also, to the extent plaintiff seeks money damages for being placed in BOP custody, that claim obviously fails.

The judgment of the district court is affirmed. See 1st Cir. R. 27.0(c).

By the Court:

/s/ Richard Cushing Donovan, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COY PHELPS
Plaintiff(s)

v. CIVIL ACTION NO. 07-40147-GAO

CAROLYN SABOL, ALBERTO GONZALES, and HARLEY LAPPIN
Defendant(s)

JUDGMENT IN A CIVIL CASE

O'TOOLE ,D.J.

IT IS ORDERED AND ADJUDGED

Pursuant to the court's Opinion and Order, dated March 27, 2008, the government's motion to dismiss pursuant to Fed. R. Civ.P. 12(b)(6) (dkt. No 12) is GRANTED.

SARAH A. THORNTON,
CLERK OF COURT

By /s/ Paul S. Lyness
Deputy Clerk

Dated: 3/27/08

(JudgementCivil.wpd - 3/7/2005)

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 07-40147-GAO

COY PHELPS,
Plaintiff,

v.

CAROLYN SABOL, ALBERTO GONZALES, and HARLEY LAPPIN,
Defendants.

OPINION AND ORDER
March 27, 2008

O'TOOLE, D.J.

The plaintiff, Coy Phelps, is confined at the Federal Medical Center in Devens, Massachusetts ("FMC Devens"). In 1986 he was found not guilty only by reason of insanity in the United States District Court for the Northern District of California on charges of possessing, manufacturing, and placing pipe bombs at five San Francisco locations, in violation of 26 U.S.C. § 5861(d) and (f), and 18 U.S.C. § 844(f) and (i). Subsequently, Phelps was civilly committed to the custody of the Attorney General following a hearing pursuant to 18 U.S.C. §§ 4243 and 4247. Since that time, Phelps has been housed at and transferred between the FMCs in Springfield, Missouri; Rochester, Minnesota; and Butner, North Carolina, until his most recent transfer to FMC Devens in November, 2004.

Phelps filed a complaint on May 16, 2007, which purports to make various "Bivens claims" against the defendants.[1] See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). The defendants are FMC Devens Warden Carolyn Sabol, former U.S. Attorney General Alberto Gonzales, and Federal Bureau of Prisons ("BOP") Director Harley Lappin.

The defendants moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), which, as Phelps points out in opposing the motion, appears to be a typographical error because the accompanying memorandum in support of the motion is directed to a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6). The defendants have not waived their ability to assert a Rule 12(b)(6) motion, see Fed. R. Civ. P. 12(h), and because Phelps clearly recognized that the defendants intended to make such a motion and addressed his opposition brief accordingly, I construe the defendants' motion as a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6).

The main thrust of Phelps' complaint is that as a civilly committed person he is not lawfully in the custody of the BOP under 18 U.S.C. § 4243 because he is not a "prisoner." Phelps has previously litigated this claim in this Court, and its merits have been rejected. See Phelps v. Winn, 2007 WL 2872465, at *1–2 (D. Mass. Sept. 27, 2007); Phelps v. Bracy, 2007 WL 2872458, at *2 (D. Mass. Sept. 27, 2007). In this complaint, Phelps makes a number of

---

[1] Phelps refers to himself as the "Petitioner" and to the defendants as "Respondents" in his complaint. Because Phelps' complaint is clearly a Bivens action rather than a habeas petition, Phelps is the plaintiff and Sabol, Gonzales, and Lappin are the defendants.

claims that either restate this recurring argument or derive from it. Phelps lists a number of incidents which at first blush appear to be an attempt to make separate claims, but then states that "[t]he incidents stated above are not presented for debate or for claims of abuse, mistreatment, torture, oppression, and persecution including retaliation and harassment, but rather, the incidents are presented to show that Phelps was "PUNISHED" in violation of clearly established U.S. Supreme Court law ... and such punishment was by the rules and regulations of the Federal Bureau of Prisons which do not apply to Phelps...." (See Compl. 32.) Having previously rejected Phelps' argument that he is unlawfully in the custody of the BOP, these claims need not be discussed.

As to Phelps' other claims, they are not addressed at the named defendants. "A Bivens action only may be brought against federal officials in their individual capacities. Even then, the plaintiff must state a claim for direct rather than vicarious liability; respondeat superior is not a viable theory of Bivens liability." Ruiz Rivera v. Riley, 209 F.3d 24, 28 (1st Cir. 2000). Phelps' claims which seeks to recover damages based on the asserted illegality of his civil commitment are barred by Heck v. Humphrey, 512 U.S. 477, 485–86 (1994).

Phelps' complaint fails to state a claim upon which relief can be granted, and the government's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) (dkt. no. 12) is GRANTED. In light of this Opinion and Order, the following motions are MOOT: Notice for Mot. for Decl. J. (dkt. no. 3); Notice for Mot. for an Inj. (dkt. no 4); Mot. for Prelim. Inj. (dkt. no. 5); Mot. for Decl. J. (dkt. no. 6); Mot. to Take Judicial Notice (dkt. no 11); Mot. for Appointment of Amicus Curae (dkt. no. 14).

It is SO ORDERED.

/s/ George A. O'Toole, Jr.
United States District Judge

APPENDIX D

UNITED STATES CODE

Section 4243. Hospitalization of a person found not guilty only by reason of insanity

(a) Determination of Present Mental Condition of Acquitted Person. - If a person is found not guilty only by reason of insanity at the time of the offense charged, he shall be committed to a suitable facility until such time as he is eligible for release pursuant to subsection (e).

(b) Psychiatric or Psychological Examination and Report. - Prior to the date of the hearing, pursuant to subsection (c), the court shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) Hearing. - A hearing shall be conducted pursuant to the provisions of section 4247(d) and shall take place not later than forty days following the special verdict.

(d) Burden of Proof. - In a hearing pursuant to subsection (c) of this section, a person found not guilty only by reason of insanity of an offense involving bodily injury to, or serious damage to the property of, another person, or involving a substantial risk of such injury or damage, has the burden of proving by clear and convincing evidence that his release would not create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect. With respect to any other offense,

the person has the burden of such proof by a preponderance of the evidence.

(e) Determination and Disposition. - If, after the hearing, the court fails to find by the standard specified in subsection (d) of this section that the person's release would not create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility until –

> (1) such a State will assume such responsibility; or
>
> (2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment, would not create a substantial risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

(f) Discharge. - When the director of the facility in which an acquitted person is hospitalized

pursuant to subsection (e) determines that the person has recovered from his mental disease or defect to such an extent that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment, would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. The court shall order the discharge of the acquitted person or, on the motion of the attorney for the Government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by the standard specified in subsection (d) that the person has recovered from his mental disease or defect to such an extent that -

(1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be immediately discharged; or

(2) his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall -

(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him,

that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

(g) Revocation of Conditional Discharge. - The director of a medical facility responsible for administering a regimen imposed on an acquitted person conditionally discharged under subsection (f) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

(h) Limitations on Furloughs. - An individual who is hospitalized under subsection (e) of this

section after being found not guilty only by reason of insanity of an offense for which subsection (d) of this section creates a burden of proof of clear and convincing evidence, may leave temporarily the premises of the facility in which that individual is hospitalized only -

(1) with the approval of the committing court, upon notice to the attorney for the Government and such individual, and after opportunity for a hearing;

(2) in an emergency; or

(3) when accompanied by a Federal law enforcement officer (as defined in section 115 of this title).

(i) Certain Persons Found Not Guilty by Reason of Insanity in the District of Columbia. -

(1) Transfer to custody of the attorney general. - Notwithstanding section 301(h) of title 24 of the District of Columbia Code, and notwithstanding subsection 4247(j) of this title, all persons who have been committed to a hospital for the mentally ill pursuant to section 301(d)(1) of title 24 of the District of Columbia Code, and for whom the United States has continuing financial responsibility, may be transferred to the custody of the Attorney General, who shall hospitalize the person for treatment in a suitable facility.

(2) Application. -

(A) In general. - The Attorney General may establish custody over such persons by filing an application in the United States District Court for the District of Columbia,

demonstrating that the person to be transferred is a person described in this subsection.

(B) Notice. - The Attorney General shall, by any means reasonably designed to do so, provide written notice of the proposed transfer of custody to such person or such person's guardian, legal representative, or other lawful agent. The person to be transferred shall be afforded an opportunity, not to exceed 15 days, to respond to the proposed transfer of custody, and may, at the court's discretion, be afforded a hearing on the proposed transfer of custody. Such hearing, if granted, shall be limited to a determination of whether the constitutional rights of such person would be violated by the proposed transfer of custody.

(C) Order. - Upon application of the Attorney General, the court shall order the person transferred to the custody of the Attorney General, unless, pursuant to a hearing under this paragraph, the court finds that the proposed transfer would violate a right of such person under the United States Constitution.

(D) Effect. - Nothing in this paragraph shall be construed to -

(i) create in any person a liberty interest in being granted a hearing or notice on any matter;

(ii) create in favor of any person a cause of action against the United States

or any officer or employee of the United States; or

(iii) limit in any manner or degree the ability of the Attorney General to move, transfer, or otherwise manage any person committed to the custody of the Attorney General.

(3) Construction with other sections. - Subsections (f) and (g) and section 4247 shall apply to any person transferred to the custody of the Attorney General pursuant to this subsection.

Section 4247. General provisions for chapter

(a) Definitions. - As used in this chapter -

(1) "rehabilitation program" includes -

(A) basic educational training that will assist the individual in understanding the society to which he will return and that will assist him in understanding the magnitude of his offense and its impact on society;

(B) vocational training that will assist the individual in contributing to, and in participating in, the society to which he will return;

(C) drug, alcohol, and other treatment programs that will assist the individual in overcoming his psychological or physical dependence; and

(D) organized physical sports and recreation programs;

(2) "suitable facility" means a facility that is suitable to provide care or treatment given the

nature of the offense and the characteristics of the defendant; and

(3) "State" includes the District of Columbia.

(b) Psychiatric or Psychological Examination. - A psychiatric or psychological examination ordered pursuant to this chapter shall be conducted by a licensed or certified psychiatrist or psychologist, or, if the court finds it appropriate, by more than one such examiner. Each examiner shall be designated by the court, except that if the examination is ordered under section 4245 or 4246, upon the request of the defendant an additional examiner may be selected by the defendant. For the purposes of an examination pursuant to an order under section 4241, 4244, or 4245, the court may commit the person to be examined for a reasonable period, but not to exceed thirty days, and under section 4242, 4243, or 4246, for a reasonable period, but not to exceed forty-five days, to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in the suitable facility closest to the court. The director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 4241, 4244, or 4245, and not to exceed thirty days under section 4242, 4243, or 4246, upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant.

(c) Psychiatric or Psychological Reports. - A psychiatric or psychological report ordered pursuant to this chapter shall be prepared by the examiner designated to conduct the psychiatric or psychological examination, shall be filed with the court with copies provided to the counsel for the

person examined and to the attorney for the Government, and shall include -

(1) the person's history and present symptoms;

(2) a description of the psychiatric, psychological, and medical tests that were employed and their results;

(3) the examiner's findings; and

(4) the examiner's opinions as to diagnosis, prognosis, and -

(A) if the examination is ordered under section 4241, whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

(B) if the examination is ordered under section 4242, whether the person was insane at the time of the offense charged;

(C) if the examination is ordered under section 4243 or 4246, whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another;

(D) if the examination is ordered under section 4244 or 4245, whether the person is suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a suitable facility; or

(E) if the examination is ordered as a part of a presentence investigation, any recommendation the examiner may have as to how the mental condition of the defendant should affect the sentence.

(d) Hearing. - At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

(e) Periodic Report and Information Requirements. - (1) The director of the facility in which a person is hospitalized pursuant to -

(A) section 4241 shall prepare semiannual reports; or

(B) section 4243, 4244, 4245, or 4246 shall prepare annual reports concerning the mental condition of the person and containing recommendations concerning the need for his continued hospitalization. The reports shall be submitted to the court that ordered the person's commitment to the facility and copies of the reports shall be submitted to such other persons as the court may direct. A copy of each such report concerning a person hospitalized after the beginning of a prosecution of that person for violation of section 871, 879, or 1751 of this title shall be submitted to the Director of the United States Secret Service. Except with

the prior approval of the court, the Secret Service shall not use or disclose the information in these copies for any purpose other than carrying out protective duties under section 3056(a) of this title.

(2) The director of the facility in which a person is hospitalized pursuant to section 4241, 4243, 4244, 4245, or 4246 shall inform such person of any rehabilitation programs that are available for persons hospitalized in that facility.

(f) Videotape Record. - Upon written request of defense counsel, the court may order a videotape record made of the defendant's testimony or interview upon which the periodic report is based pursuant to subsection (e). Such videotape record shall be submitted to the court along with the periodic report.

(g) Habeas Corpus Unimpaired. - Nothing contained in section 4243 or 4246 precludes a person who is committed under either of such sections from establishing by writ of habeas corpus the illegality of his detention.

(h) Discharge. - Regardless of whether the director of the facility in which a person is hospitalized has filed a certificate pursuant to the provisions of subsection (e) of section 4241, 4244, 4245, or 4246, or subsection (f) of section 4243, counsel for the person or his legal guardian may, at any time during such person's hospitalization, file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility, but no such motion may be filed within one hundred and eighty days of a court determination that the person should continue to be hospitalized. A copy of the

motion shall be sent to the director of the facility in which the person is hospitalized and to the attorney for the Government.

(i) Authority and Responsibility of the Attorney General. - The Attorney General -

(A) may contract with a State, a political subdivision, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody pursuant to this chapter;

(B) may apply for the civil commitment, pursuant to State law, of a person committed to his custody pursuant to section 4243 or 4246;

(C) shall, before placing a person in a facility pursuant to the provisions of section 4241, 4243, 4244, 4245, or 4246, consider the suitability of the facility's rehabilitation programs in meeting the needs of the person; and

(D) shall consult with the Secretary of the Department of Health and Human Services in the general implementation of the provisions of this chapter and in the establishment of standards for facilities used in the implementation of this chapter.

(j) Sections 4241, 4242, 4243, and 4244 do not apply to a prosecution under an Act of Congress applicable exclusively to the District of Columbia or the Uniform Code of Military Justice.